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GOVERNMENT OF STATE OF SARAWAK v. DATO' SRI WONG SOON KOH (NO 3)

HIGH COURT SABAH & SARAWAK, SIBU
CHRISTOPHER CHIN SOO YIN JC
[SUIT NO: SBW-21NCVC-3-6-2020]
10 DECEMBER 2021

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Abstract – *A political party cannot sue an individual for defamation. Likewise, the State Government of Sarawak herein cannot by its own name sue an individual member of the State Legislature for defamation. The issue regarding the system of government with its concomitant issue of separation of powers between the Cabinet and the Legislature aside, a question arises, if defamation is proven, whether the defendant, being part and a member of the State Legislature, and therefore part of the Government of Sarawak, is also defaming his own self. At the very least, to obtain the necessary locus standi, the Majlis Mesyuarat Kerajaan Negeri should have been named as the plaintiff, or co-plaintiff.*

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TORT: *Defamation – Locus standi – Claimant and another party entered into settlement and made joint statement referring to payment of sales tax arrears – Individual questioned terms of settlement based on joint statement – Claimant issued press statement seeking to clarify matters in joint statement and individual responded to claimant's statement – Whether claimant decision-maker in negotiations that led to settlement – Whether claimant party damaged by alleged impugned words – Whether claimant had locus standi to commence action*

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The plaintiff had passed laws imposing a sales tax on the sale of petroleum products where such products were mined or won from within the boundaries of Sarawak. Petroleum Nasional Berhad ('Petronas') disputed liability for such tax and sought a judicial review at the High Court to have such tax law declared a nullity. The plaintiff commenced an action against Petronas, around the same time, to recover the newly imposed tax which by then had fallen into arrears. The High Court ruled in favour of the Comptroller. The plaintiff and Petronas then applied to stay all other proceedings at the High Court and both parties reached a settlement of the disputed sales tax. The plaintiff and Petronas issued a signed joint statement, referring to the payment of RM2 billion of sales tax arrears by Petronas to the plaintiff ('joint statement'). On the same day, the defendant issued a press statement which, in essence, questioned the terms of the settlement evidenced from the contents of the joint statement ('defendant's press statement'). The plaintiff quickly issued a press statement seeking to clarify certain matters in the joint statement ('plaintiff's statement'). The defendant

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issued a second statement seeking to clarify certain aspects of his earlier statement and in part response to the plaintiff's statement ('defendant's reply statement'). The plaintiff sued the defendant for defamation arising from the contents of the defendant's reply statement ('impugned words'). According to the plaintiff, the publication of the impugned words in their natural and ordinary meaning, meant that the plaintiff: (i) did act behind closed doors to the severe detriment of the interests and rights of Sarawak and its people and had given Petronas a massive discount over the sum which Petronas was legally obliged; (ii) had given a massive discount of the State sales tax to Petronas under a deal struck behind closed doors was to the benefit and advantage of some members of Parliament from the ruling coalition in the State Government of Sarawak who are members in the Cabinet of the Federal Government; and (iii) had failed in its duties to defend the legal rights and interests of the State and its people with the result 'Sarawak received nothing in exchange for the waiver of our petroleum rights' and that the plaintiff caused the State to lose its rights over petroleum by accepting a meagre payment of RM2 billion from Petronas.

Held (dismissing claim):

(1) The evidence clearly showed that the decision-maker in the negotiations with Petronas was not the whole body of the State Government but of Majlis Mesyuarat Kerajaan Negeri ('MMKN') through the Chief Minister's Office alone, the party who would be damaged by the impugned words, if proven, would be MMKN and not the State Government of Sarawak. Using a corporate analogy, the MMKN is likened to the board of directors of a company made up of all its shareholders, properly appointed and clothed with the authority and power to function as the brains and mouthpiece of the company. If there was anyone defamed by the impugned words, it could therefore only be the Executive *qua* the MMKN and not the Legislature *qua* State Government of Sarawak. Hence, the MMKN should have been named as the plaintiff or, at least, the co-plaintiff in this case instead of the whole body of the State Government of Sarawak. (paras 29 & 32)

(2) A political party could not sue an individual for defamation. As the actual party who could be defamed by the impugned words was the GPS Government then, the GPS Government was precluded from maintaining this action against the defendant. This case should therefore end here as the plaintiff's case failed. The plaintiff was wrongly named as the plaintiff and should have been limited to or included the MMKN and, hence, the *locus standi* of the plaintiff was not clearly established for this defamation suit. In the alternative and additionally, the impugned words did not defame the plaintiff. (paras 34, 35 & 114)

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***

Adam v. Ward [1917] AC 309 ***(refd)***

Basnol Abol & Ors v. The State Government Of Sarawak & Other Appeals [2004] 2 CLJ 553 FC ***(refd)***

Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***

Chong Chieng Jen v. Government Of State Of Sarawak & Anor [2019] 1 CLJ 329 FC ***(refd)***

Derbyshire County Council v. Times Newspapers Ltd [1993] AC 534 ***(refd)***

Goldsmith & Anor v. Bhoyrul & Ors [1997] 4 All ER 268 ***(refd)***

JB Jeyaretnam v. Goh Chok Tong [1984] 1 LNS 139 ***(refd)***

Jones v. Skelton [1963] 3 All ER 952 ***(refd)***

Joshua Benjamin Jeyaretnam v. Goh Chok Thong [1989] 1 LNS 34 ***(refd)***

Lewis & Anor v. Daily Telegraph Ltd; Same v. Associated Newspapers Ltd [1963] 2 All ER 151 ***(refd)***

Malaysian Chinese Association v. Lim Lip Eng (Civil No: 02(i)-25-03-2020(W)) (Unreported) ***(refd)***

Petroliam Nasional Bhd (Petronas) v. Comptroller Of State Sales Tax, Sarawak & Ors [2021] 1 CLJ 430 HC ***(refd)***

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC ***(refd)***

Slim v. Daily Telegraph Ltd [1968] 2 QB 157 ***(refd)***

Soh Chun Seng v. CTOS-EMR Sdn Bhd [2004] 5 CLJ 46 HC ***(refd)***

Synergy Promenade Sdn Bhd v. Datuk Seri Hj Razali Hj Ibrahim [2021] 8 CLJ 891 CA ***(refd)***

Town Investments Ltd & Ors v. Department of the Environment [1978] AC 359 ***(refd)***

Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***

Wong Kii Yii v. Datuk Chin Chee Kee [2013] 1 LNS 510 HC ***(refd)***

Legislation referred to:

Constitution of the State of Sarawak, art. 6

Federal Constitution, art. 10(1)(a)

Petroleum Development Act 1974, s. 2(1)

Other source(s) referred to:

Darryl SC Goon*, Of Public Interest, Freedom of Speech and the Law of Defamation,* Jan [2018] JMJ, p 206

Gatley on Libel and Slander, 9th edn, pp 96, 97

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Reported by Lina E

JUDGMENT
(after trial)

Christopher Chin Soo Yin JC:

Preliminaries

[1] It is trite, well-worn and well-settled in many eloquent iterations that freedom of speech under our Federal Constitution is not absolute. Among several statutory and other common law curtailments of freedom of speech is the tort of defamation, which demands that freedom of speech must at some point give way to protection against reputational damage. (Datuk) Darryl SC Goon (now JCA), "*Of Public Interest, Freedom of Speech and the Law of Defamation*" Jan [2018] JMJ at p. 206.

[2] This case involves a suit between politicians, the plaintiff, having the majority of the seats in the Sarawak Dewan Undangan Negeri (DUN) through its coalition of parties known by its acronym "GPS", as the Executive, while the defendant, the leader of the opposition party known as "PSB", in the same State.

[3] Although reeking of classic political rivalry between the group in power and the group that is not, this defamation suit had its genesis in another dispute, this time between the plaintiff and Petroleum Nasional Berhad ("PETRONAS").

[4] The plaintiff had passed law imposing a sales tax on the sale of petroleum products where such products were mined or won from within the boundaries of Sarawak State. PETRONAS disputed liability for such tax and sought by an action of judicial review in 2019 ("the JR") at the Kuching High Court to have such tax law declared a nullity. Around the same time the plaintiff commenced a writ action against PETRONAS to recover the newly imposed tax which by then had fallen into arrears.

[5] The outcome of the JR was that His Lordship Tuan Azhahari Kamal Ramli J in *Petroliam Nasional Bhd (Petronas) v. Comptroller Of State Sales Tax, Sarawak & Ors* [2021] 1 CLJ 430 ruled in March 2020 at the Kuching High Court in favour of the Comptroller, and that PETRONAS, "was bound by any State law passed by the State's Legislature, including the State Sales Tax Ordinance".

[6] The plaintiff and PETRONAS then applied to stay all other proceedings commenced in the Kuching High Court (including the appeal by PETRONAS to the Court of Appeal against the decision of the JR) while they entered into negotiations to settle the disputed sales tax. These negotiations culminated in a settlement when on the 8 May 2020 both the plaintiff and PETRONAS issued a signed joint statement ("the joint statement") which expressly referred to the payment of RM2 billion of sales tax arrears by PETRONAS to the plaintiff.

[7] Almost immediately, the defendant on the same day, that is the 8 May 2020, ("the defendant's press statement") issued a press statement which in essence questioned the terms of the settlement evidenced from the contents of the joint statement.

[8] The plaintiff through YB Sharifah Hasidah bt Sayeed Aman Ghazali (PW1) quickly issued a press statement on the 9 May 2020 ("the plaintiff's statement") seeking to clarify certain matters in the joint statement.

[9] Seemingly not satisfied, the defendant issued a second statement dated the 9 May 2021 ("defendant's reply statement") seeking to clarify certain aspects of his earlier statement and in part response to the plaintiff's statement.

The Impugned Words

[10] On the 10 June 2020 the plaintiff filed at the Sibu High Court Registry, a statement of claim (encl. 2) suing the defendant for defamation arising from the content of the defendant's reply statement. The words complained of are reproduced from para. 3 of the plaintiff's statement of claim:

> 3. On or about the 9th May 2020, the defendant in his capacity as president of PSB issued or caused to be issued and published a Press Statement, a copy whereof is hereto annexed as "Appendix A", to the media or newspapers circulating in the State of Sarawak and posted on Facebook containing, *inter alia*, the following defamatory words about and/or concerning the plaintiff, namely:
>
> (a) ... the Sarawak Government owes an explanation to the DUN and the people of Sarawak why Petronas was allowed to pay only RM2 billion when it owed RM3.8 billion. Why the massive discount?
>
> (b) More importantly, what deal was struck behind closed doors between the GPS Government and Petronas for Sarawak to give up its petroleum rights in exchange for a meagre payment of RM2 billion which Petronas was already obligated to pay under the Court Order? Sarawak received nothing in exchange for the waiver of our petroleum rights.
>
> (c) I have posed this question which must have been in the minds of all Sarawakians; Is this GPS government now silent because its MPs are in the Cabinet of the Federal Government.

(hereinafter collectively called "the impugned words").

[11] The plaintiff alleged that due publication of the defamatory statements and that in their natural and ordinary meaning, the impugned words meant that the plaintiff:

(i) did act behind closed doors to the severe detriment of the interests and rights of Sarawak and its people and had given PETRONAS a massive discount over the sum which PETRONAS was legally obliged to pay;

(ii) had given a massive discount of the State sales tax to PETRONAS under a deal struck behind closed doors was to the benefit and advantage of some members of Parliament from the ruling coalition in the State Government of Sarawak who are members in the Cabinet of the Federal Government; and

(iii) had failed in its duties to defend the legal rights and interests of the State and its people with the result "Sarawak received nothing in exchange for the waiver of our petroleum rights" and that the plaintiff caused the State to lose its rights over petroleum by accepting a meagre payment of RM2 billion from PETRONAS.

[12] The plaintiff alleged that the impugned words were completely untrue and constituted a grave libel against the plaintiff. The plaintiff then claimed against the defendant damages of RM5 million, exemplary or aggravated damages and an injunction to restrain the defendant either by himself or indirectly to further repeat the impugned words or its like, which they alleged were defamatory of the plaintiff and resulted in damage to the plaintiff's reputation.

[13] While not expressed or reproduced herein in detail, I have seriously considered, appreciated, weighed and assessed the veracity of the testimonies of the witnesses in addition to the learned (and in the case of the plaintiff) lengthy submissions, but have made reference to them only where absolutely necessary.

Burden Of Proof

[14] The burden falls on the plaintiff to prove that the impugned words are:

(i) capable of a defamatory meaning and is in fact defamatory;

(ii) that the impugned words refer to the plaintiff; and

(iii) that the impugned words were published.

[15] If the plaintiff has discharged its burden then the burden shifts to the defendant to raise and prove the defence of:

(i) justification;

(ii) fair comment; and/or

(iii) qualified privilege.

[16] It is necessary to apply the above test not only to each of the three impugned words but to the three impugned words together within the context of the entire defendant's reply statement as a whole.

The Party Allegedly Defamed

[17] The defendant's reply statement, being the source of the impugned words, clearly refers to the "GPS" (Gabungan Parti Sarawak) Government. After all, this statement was made in response to the explanation from the

plaintiff's statement of the same date issued by PW1, YB Datuk Hjh Sharifah Hasidah bt Sayeed Aman Ghazali, Assistant Minister of Law, State-Federal Relations and Project Monitoring. GPS is a coalition of parties which formed the State Government of Sarawak and whose members make up the State Cabinet or MMKN (see below). GPS is in essence another political party made up of a coalition of other parties.

[18] The defendant's reply statement makes several references to "GPS" leaving little doubt that this statement was directed at the GPS Government.

Locus Standi

[19] From the outset of the trial I requested counsels to submit to me on the *locus standi* of the plaintiff being named in this suit as "Government of the State of Sarawak". Although the issue of *locus standi* does not form part of the defendant's pleaded case, this issue goes to the root of the legal capacity of a party to maintain an action in law and hence this court should be entitled to address this issue based on the learned submissions by counsels.

[20] It is questionable if this court has, at the outset, jurisdiction to make or grant orders in respect of parties whose legal capacity to sue or be sued is not established. Particularly so in a case of defamation because if the plaintiff's case is proven, the court has to be certain whose reputation, if any has been blunted for the ascertainment of damages.

[21] The system of Government with the separation of powers has been reinforced in some measure in Malaysia in cases such as *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 4 AMR 123 where Zainun Ali FCJ stated:

> The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.

[22] The fact that *Semenyih* (*supra*) dealt more with judicial independence is apt as the instant case involves this court adjudicating a dispute between two groups of persons all duly elected into political office.

[23] In the State of Sarawak, how is the separation of powers defined? The judiciary is clear as manifested in the High Court of Sabah and Sarawak. Who then is the Legislature and who is the Executive within the context of the State of Sarawak?

[24] Article 6 of the Constitution of the State of Sarawak (G.N.S. 163/1963) provides for the creation of the Majlis Mesyuarat Kerajaan Negeri ("MMKN") with the Chief Minister appointed firstly, by the Yang di-Pertua Negeri and then, secondly, on the advice of the Chief Minister, of up to ten other members of the MMKN from members of the Dewan Undangan Negeri ("DUN").

6 - (1) There shall be a Majlis Mesyuarat Kerajaan Negeri to advise the Yang di-Pertua Negeri in the exercise of his functions.

(6) The Majlis Mesyuarat Kerajaan Negeri shall be collectively responsible to the Dewan Undangan Negeri.

[25] The MMKN is the *de facto* State Cabinet and necessarily the Executive for the purposes of the State. Behind the MMKN resides the entire machinery of the State civil service.

[26] The members of the DUN, both from the ruling coalition and the opposition make up the Legislature. This must be so because it is open for the members of the opposition in the DUN to vote in favour of passing any State law even if tabled by the ruling bloc. They may even table State laws to be passed by the DUN. Put simply, members of the opposition in the DUN are as much a part of the Legislature as are those assemblymen who are in majority/power, so long as they are entitled to sit in and vote in the DUN.

[27] This brings us to the issue as to who was alleged to be defamed in the present suit. The Legislature, or, the MMKN, or both. The defendant, being a member of the DUN, is a member of the Legislature of Sarawak so it is with some discomfort to suggest that he has (if so proven) defamed himself.

[28] I share the same unease as my brother judge YA Tuan Azhahari Kamal Ramli in *Petroliam Nasional Bhd (Petronas) v. Comptroller Of State Sales Tax, Sarawak & Ors* [2021] 1 CLJ 430, a precursor to this present case, when he ruled:

> **The State Government is not synonymous with the MMKN**, and hence, the failure of the applicant to name MMKN in this judicial review means the correct decision maker is not before this court. This failure is fatal to the applicant's case and the declaratory orders sought for should be dismissed. (emphasis added)

[29] As the evidence in the trial of this matter clearly showed that the decision-maker in the negotiations with PETRONAS was not the whole body of the State Government but of MMKN through the Chief Minister's Office alone, the party who would be damaged by the impugned words, if proven, would be MMKN and not the State Government of Sarawak. Using a corporate analogy, the MMKN is liken to the board of directors of a company made up of all its shareholders, properly appointed and clothed with the authority and power to function as the brains and mouthpiece of the company.

[30] The plaintiff in its submission after trial, in essence agrees that while MMKN is not synonymous with the State Government but that the State Government resembles the Government system and structure described in the *Town Investments Ltd & Ors v. Department of the Environment* [1978] AC 359 case cited in *Basnol Abol & Ors v. The State Government Of Sarawak & Other*

Appeals [2004] 2 CLJ 553 where the Federal Court ruled that the Government of Sarawak is a legal entity separate from the MMKN and quoted with approval from *Town Investments Ltd* (*supra*):

> It would be better instead of speaking of "the Crown" to speak of "government", – a term appropriate to embrace both collectively and individually all the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried out by the civil servants employed in the various government departments. Executive acts of government are done by any of them, in the name of her majesty or under their official designation, are acts done by "the Crown" in the fictional sense, in which that expression is now used in English public law.

[31] It must first be stated that England and Wales system of Government does not have a written constitution in the manner of the State of Sarawak, or Malaysia for that matter. *Basnol* (*supra*), if anything, reinforces the notion that the prime and sole decision and policy-maker in the context of the State Government of Sarawak vests solely with the MMKN with the power and authority to instruct the civil servants under them to discharge their directions. The civil servants have very limited discretionary powers save in administrative matters and certainly not on issues of policy.

[32] If there is anyone defamed by the impugned words, it could therefore only be the Executive *qua* MMKN and not the Legislature *qua* State Government of Sarawak. Hence the MMKN should have been named as the plaintiff or at least the co-plaintiff in this case instead of the whole body of the State Government of Sarawak.

[33] If *Basnol* has ruled that the State Government is an entity distinct from the MMKN then this present suit has left out the entity in the name of MMKN as a co-plaintiff and as YA Tuan Azhahari J has decided – is fatal to the plaintiff's cause and which should be dismissed.

[34] In the Federal Court's unreported case of *Malaysian Chinese Association v. Lim Lip Eng* (Civil No: 02(i)-25-03-2020(W)) it was held that a political party cannot sue an individual for defamation. As the actual party who can be defamed by the impugned words is the GPS Government then, by this Federal Court's decision, to which this court is bound by, the GPS Government is precluded from maintaining this action against the defendant.

[35] This case should therefore end here and the plaintiff's case fails, but, in the event my argument on the *locus standi* of the plaintiff above is found to be flawed I will proceed to decide on the substantive issue being whether the impugned words have damaged the reputation of the plaintiff and on the assumption that the plaintiff is properly named.

[36] Before the trial commenced the defendant applied to amend its defence by challenging the *locus standi* of the plaintiff from the perspective of whether a Government body could sue for defamation. I dismissed the application

and this decision was upheld by the Court of Appeal. My reasoning was that this court was bound by the decision of the Federal Court in the case of the *Chong Chieng Jen v. Government Of State Of Sarawak & Anor* [2019] 1 CLJ 329 which decided that in the context of Malaysia the existence of a piece of legislation in the Government Proceedings Act 1956 read together with the Defamation Act 1957 allowed the Government to sue for defamation, and not adopting the *ratio* in the *Derbyshire County Council v. Times Newspapers Ltd* [1993] AC 534 which was founded on the common law of England and Wales. However, notwithstanding the above chain of events, the present discussion is necessary because it is not about whether defamation is actionable by the plaintiff but rather, whether the right entity is suing.

The Test For Defamation

[37] The test to determine whether a publication is defamatory is an objective one. In other words, the intention of publisher is irrelevant. In *Slim v. Daily Telegraph Ltd* [1968] 2 QB 157, Lord Diplock said as follows:

> What is the natural and ordinary meaning of words for the purpose of the law of libel? One can start by saying that the meaning intended to be conveyed by the publisher of the words is irrelevant.

[38] What is relevant is the impression on the ordinary reasonable man. In *Lewis & Anor v. Daily Telegraph Ltd; Same v. Associated Newspapers Ltd* [1963] 2 All ER 151 at p. 154, Lord Reid said:

> ... There is no doubt that in actions for libel, the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs.

[39] In *Jones v. Skelton* [1963] 3 All ER 952 at p. 958 Lord Morris said that the test of reasonableness should guide the court in ascertaining whether a publication is defamatory in this oft-quoted passage:

> The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be a part of the ordinary and natural meaning of words (see *Lewis v. Daily Telegraph Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader, guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction, would draw from the words. The test of reasonableness guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.

(extracted with gratitude from the judgment of Datuk Ravinthran Paramaguru J (as he then was) in *Wong Kii Yii v. Datuk Chin Chee Kee* [2013] 1 LNS 510).

[40] Thus the question whether the published words bear a defamatory meaning is essentially a question of law that turns upon the construction of the words (see the judgment of Gopal Sri Ram JCA in *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461; [1999] 1 MLJ 371).

[41] It is the law that the words used in a publication should not be read in isolation but should be read as a whole and in the context they were used (see *Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393 and *JB Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139; [1985] 1 MLJ 334).

[42] His Lordship Mohd Sofian Abd Razak JCA in the recent case of *Synergy Promenade Sdn Bhd v. Datuk Seri Hj Razali Hj Ibrahim* [2021] 8 CLJ 891 had clearly set out the inquiry this court should adopt in a case of this nature, paraphrasing:

> ... the first task of a court, in an action for defamation, is to determine whether the words complained of are capable of bearing a defamatory meaning ...
>
> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory ...
>
> Having decided whether the words complained of are capable of bearing a defamatory meaning, the next step in the inquiry is for the court to ascertain whether the words complained of are in fact defamatory. **This is a question of fact dependent upon the circumstances of the particular case**. (emphasis added)

[43] Based on the above tests, it is clear that the intention of the defendant in the impugned words as well as the plaintiff's perception of them is not relevant to decide whether the statements are capable of a defamatory meaning. What is relevant is, in an objective test, what a reasonable man would think of such statement. The words would be *prima facie* defamatory if in the perception of a reasonable man the words:

(i) have a tendency to lower the reputation of the plaintiff in the eyes of others;

(ii) have a tendency to cause the plaintiff to be hated or held in contempt;

(iii) expose the plaintiff to ridicule;

(iv) tendency to cause others to shun or avoid the plaintiff; or

(v) to injure a person's trade or business or professional activity.

[44] The objective tests in this case go further. It is important to consider the source and circumstances the alleged defamatory statement are made. For instance, there is a difference between a known deranged man who stands at the steps of DUN shouting the impugned words as opposed to the defendant, a former Senior Minister issuing the same statements in a written form to the press.

[45] Hence, in Malaysia there is a two-tier test for defamation. First tier is the purely objective test to decide if the words are capable of carrying a defamatory meaning. If the answer is negative, the case ends there. If it is affirmative, then the second tier test is applicable to decide if the words are in fact defamatory of the plaintiff. The second tier of the test must extend to the consideration of the source and circumstances of the alleged defamatory statement, almost as it were, a subjective consideration within an objective test. As guided by the Court of Appeal (see para. 42 above):

> ... the next step in the inquiry is for the court to ascertain whether the words complained of are in fact defamatory. **This is a question of fact dependent upon the circumstances of the particular case**.
>
> (emphasis added)

For example, the plaintiff cannot, in an objective assessment, be said to be defamed if the same impugned words were uttered by the known deranged man.

Sequence

[46] For clarity, the sequence of events in this case is as follows:

8 May 2020	-	The plaintiff signs the joint statement with PETRONAS in essence resolving the dispute between them for which litigation in the Kuching Court had commenced;
8 May 2020	-	The defendant issues his first press statement;
9 May 2020	-	The plaintiff issues an explanatory press statement;
9 May 2020	-	The defendant issues the defendant's reply statement which contents resulted in this suit.

[47] The third paragraph of the joint statement recorded:

> Lanjutan daripada penarikan balik semua tatacara perundangan, PETRONAS melalui anak-anak syarikatnya yang terlibat, akan membuat bayaran penuh ke atas cukai jualan yang dikenakan oleh Kerajaan Negeri Sarawak ke atas produk petroleum bagi tahun 2019 berjumlah RM2 billion iaitu pada kadar 5% daripada nilai jualan produk tersebut.

Publication

[48] There can be no defamation unless there has been publication of the impugned words. This is easily dealt with. After the defendant had prepared the defendant's reply statement, the defendant testified that he handed the

same over to his press secretary. The defendant testified that he did not know what the press secretary did thereafter. If anything, there has been publication at least to the staff of the defendant. It is safe to assume in this case that the job of a press secretary is to publicise a statement given by his or her boss and this the press secretary did with delivery to the local newspapers. The newspapers, including Borneo Post as well as See Hua Daily news went on to publish the defendant's reply statement. I find that publication of the impugned words has been established and that the impugned words therein refer to the plaintiff.

This Court's Inquiry

[49] The impugned words will first be subject to the two-tier test described above. It is with this inquiries that I will now approach the impugned words initially individually then later as a whole. If the words are found to be defamatory of the plaintiff then the next step is to ascertain the damages to be accorded to the plaintiff taking into account the plaintiff's station in society.

Backdrop – the Petroleum Development Act 1974 ("PD Act")

[50] This case must be considered in the backdrop of the Petroleum Development Act 1974. This is also in relation to the Malaysia Agreement 1963 ("MA 63"). This issue has fermented an erosion in State-Federal relationship as well as fuelled a disturbing open call for secession of the State from the Federation by the locals and stems from the passing of the above Act and its related issues. The above Act was passed by Parliament in 1974 and under this Act, the mining, winning and extraction and sale of petroleum products in Malaysia was reserved to a company eventually to be incorporated and known as PETRONAS. Section 2(1) of this Act provides:

> 2. (1) The entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia shall be vested in a Corporation to be incorporated under the Companies Act 1965 or under the law relating to incorporation of companies.

[51] The Petroleum Development Act 1974 was followed by the Sarawak State signing an "agreement" with PETRONAS on the 27 March 1975 ("PD Agreement") which provided, among other things:

> NOW THEREFORE in return for the ownership and the rights, powers, liberties and privileges in respect of petroleum vested by the GOVERNMENT (of Sarawak) in PETRONAS, IT IS HEREBY AGREED as follows:
>
> 1. (1) PETRONAS shall make to the GOVERNMENT cash payment in the form of yearly sum amounting to the equivalence of 5% of the value of the petroleum won and saved from areas in Sarawak and sold by PETRONAS or its agents ...

[52] Given that the Federal Constitution ultimately allows rights over natural resources to be exclusively reserved to the Borneo States, the divesting by the State of any such resources can be effected not by a simple agreement but by an Act of the State Legislative Assembly, as was done by the State of Sabah when the Federal Territory of Labuan was created by excising the Federal Territory of Labuan, out of Sabah's territorial boundaries (see Federal Territory of Labuan Enactment, 1984 and the Constitutional (Amendment No 2) Act 1984).

[53] From all these, the issue of whether PETRONAS has ownership of the State's natural resources or whether PETRONAS (by the PD Act and the PD Agreement read against the supremacy of the Federal Constitution) only owned extraction or mining and marketing rights while the sovereign ownership of the resource remains with the Borneo States has provided rich fodder for politicians to canvass support from the proletariat.

[54] It is not the place of this court to decide these constitutional issues here and one must wait for the interested and affected parties for themselves to excite a suit and have these issues adjudicated and decided once and for all. The background to this PD Act and PDA Agreement is best illustrated from an extract from an article in the Borneo Post, a widely subscribed local broadsheet published on the 17 November 2016 which was included in the bundles:

> The question hinges on the state of emergency under which the bill was passed in 1974, according to Abang Abdul Rahman Zohari, who is popularly known as Abang Johari (present CM of Sarawak).
>
> To recap, days after the racial riots on May 13, 1969, the then Yang di-Pertuan Agong issued the Emergency Proclamation, applicable to the whole country. Parliament was suspended and the entire nation was placed under a caretaker government, led by the then deputy prime minister Tun Abdul Razak Hussein, until 1971.
>
> While Parliament reconvened in 1970, the proclamation – along with two other emergency proclamations that applied to Sarawak and Kelantan – were never lifted until 2011.
>
> That means the Petroleum Development Bill was passed while the nation was, technically, under a state of emergency. In end-2011, Parliament revoked the three proclamations as the conditions that precipitated them – security and public order coming under threat – no longer existed.
>
> Some parties have argued that the lifting of the proclamations means certain legislation, including the PDA [PD Act], which was enacted using emergency powers, will cease to have effect.
>
> "So, the question is, when the emergency was lifted, is (the PDA) [PD Act] [still] relevant? We don't know. That's what we have to discuss (with the federal government)", says Abang Johari.

A He adds that Sarawak has formed a "high-level committee to [look into it] because we feel that it (the PDA) [PD Act] is not relevant anymore". However, he stresses that it is for the legal minds from both sides to determine and "not for me to decide".

The Sarawak government's position on the issue is relatively new. Abang B Johari's immediate predecessor, the late Tan Sri Adenan Satem, had started the ball rolling by asking for higher oil royalties than the present 5% after becoming chief minister in 2014.

That year, the Sarawak legislative assembly, led by Adenan, unanimously passed a motion to ask for 20% oil royalty, a move originally mooted by C the opposition. This marked a departure for Sarawak, which had not raised the issue for decades since the PDA (PD Act) was enacted.

[55] Hence with the uncertainties surrounding the PD Agreement and the PD Act and the somewhat passionate sense of injustice felt by Sarawakians, any deal between the State and PETRONAS will surely arouse the D immediate and intense sensitivities of Sarawakians. It follows that issues in relation to the PD Agreement and PETRONAS are heavily politicised. The root of this present defamation suit sprout from these sensitivities and must therefore be considered in this light.

[56] These sensitivities are further supported by the testimony of PW1 E (the Assistant Minister to the Chief Minister in Charge of Law, State-Federal Relation and Project), in cross-examination:

Q236: I refer you to page 1 of Bundle C "Chief Minister Datuk Patinggi Abang Johari Tun Openg said the PDA [Petroleum Development Act 1974] and TSA (Territorial Sea Act) are not relevant in F Sarawak. He said both were federal laws and for any Federal laws to be implemented in Sarawak, the Sarawak DUN has to endorse it. However, he noted that the state DUN had not endorsed both laws – the PDA [PD Act] and TSA – and therefore, they could not be implemented or superseded.

Do you agree with me that the CM said TSA and PDA [PD Act] G are not relevant in Sarawak and could not be implemented in Sarawak?

A: I read this statement, and to be fair to the Chief Minister, he feels like all of us here, I supposed that some laws are not fair to Sarawak and hence the statement.

H **[57]** PW1 conceded in cross-examination:

Q301: Do you agree that matters concerning PDA and the state's rights and ownership over oil and gas are matters of public interest and importance?

I A: Yes.

Malice

[58] It is necessary to first determine if there was an element of malice in the impugned words. This is necessary as malice may have the effect of negating some of the defences raised by the defendant.

[59] Scrutinising the words of the impugned words particularly in the light of the entire defendant's reply statement I note that the words used are what one would use in ordinary parlance. There were no derogatory, foul or demeaning words used against the plaintiff. Facts were stated and questions were asked based on the facts. There is no doubt that the words may have been slanted with the intention of putting the plaintiff in a certain bad light but this is expected, even by the ordinary reasonable man, as between politicians on different sides of the political divide and well within the limits of the constitutional right to freedom of speech.

[60] Assuming the defendant left the ruling coalition under unpleasant circumstances, any such ill feeling was not manifested in the language contained in the defendant's reply statement. I therefore find no clear evidence of malice in the impugned words especially when read in the context of the full defendant's reply statement. Hint of political rivalry clearly yes but certainly not malice. One can safely say that the general public perception of the reputation of politicians in Malaysia as a whole is such that the threshold to defame a politician, especially by another politician is, in the eyes of the reasonable man, high.

[61] The reasonable man in Malaysia who does not reside on an ivory tower would be bombarded by the numerous posts on social media highly critical of politicians. It is safe to say that only a very small percentage of public information (true or otherwise) on social media are in praise of the politicians in power. While it is also clear politicians in Sarawak do not deserve to be lumped together with some of their more notorious counterparts in other States, in the words of the American statesman, Henry Kissinger:

> 90% of the politicians give the other 10% a bad reputation.

[62] I find that the impugned words are not only what an ordinary man would hear from politicians, but, would expect to hear from a member (in this case the leader) of the opposition. I find no malice in the impugned words on the part of the defendant.

First Impugned Words

> ... the Sarawak Government owes an explanation to the DUN and the people of Sarawak why Petronas was allowed to pay only RM2 billion when it owed RM3.8 billion. Why the massive discount?.

[63] Read in isolation this statement does seem, from the objective standpoint, to suggest that the plaintiff had short-changed Sarawakians and hence had acted to the detriment of the interests of Sarawakians when it is their duty instead to protect, thus capable of a defamatory meaning.

[64] Ramly Ali J (later JCA and FCJ) in *Soh Chun Seng v. CTOS-EMR Sdn Bhd* [2004] 5 CLJ 46 at p. 53 ruled:

> In construing the meanings of the words complained of as pleaded by the plaintiff, the court must do so in the context of the entirety of the contents of exh. P2.

[65] In *Gatley on Libel and Slander* (9th edn) at p. 96 the learned author states:

> It is necessary to take into consideration, not only the actual words used, but the context of the words.

[66] At p. 97, the learned author continues:

> It follows from the fact that the context and circumstances of the publication must be taken into account and that **the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory**. This or that sentence may be considered defamatory, but there may be other passages which take away the sting.
>
> (emphasis added)

From the above it is clear the impugned words must not be read in isolation but in the context of the whole defendant's reply statement.

[67] Coming back to the first impugned words above I note that the defendant's reply statement gave an explanation as to his allegation of the massive discount.

> ... But even if the RM2 billion is only payment for 2019, the settlement is still far too little. Let us examine the budget speech of the Chief Minister/Finance Minister for budget 2019.
>
> At page 37 para. 44, the Chief Minister stated:
>
> The 2019 State revenue estimate is made up of:
>
> (a) Tax revenue which is expected to be at RM5.268 billion or 50 percent of the total expected revenue in 2019, comprises of the following:
>
> (i) RM4.462 billion from Sales Tax of which RM3.897 billion is from petroleum products ...

[68] While the Chief Minister's tabled to the DUN the sum of RM3.897 billion, PETRONAS appeared to only have paid RM2 billion as stated in the joint statement as full payment for the sales tax:

> ... akan membuat **bayaran penuh** ke atas cukai jualan yang dikenakan oleh Kerajaan Negeri Sarawak ke atas produk petroleum bagi tahun 2019 **berjumlah RM2 billion** ... (emphasis added)

in the joint statement (see para. [42] above]). Hence, the first impugned words in the context of the entire defendant's reply statement, is an entirely justified and is a reasonable question to ask. The drop from RM3.897 billion to RM2 billion stated to be paid by PETRONAS in the joint statement translates to a hefty discount of about 48%.

[69] In addition, the quotation pleaded in the plaintiff's statement of claim was, for reasons not made clear by the plaintiff, not a faithful reproduction of the words from the defendant's reply statement. It left out the qualifying opening words, "If that be the case ..." and the word "about" in "should be about RM3.8 billion ...". The reading of this impugned words in its full amended version renders the same to be a logical question or statement following the earlier disclosure of how the rationale for suggesting a discount had been given.

[70] The plaintiff went to great lengths to lead evidence to the effect that the figure of RM3.897 billion was, in any event, not accurate because (i) there was a subsequent reduction of about RM1 billion caused by the exclusion of liquefied natural gas from the classification of taxable goods; (ii) the final figure was subject to final calculation upon ascertainment of the actual volume of the revised petroleum products sold, which volume was not yet known; and (iii) some of the RM3.897 billion was not due from PETRONAS, but from other oil and gas companies operating within Sarawak. The defendant in turn led evidence of the Chief Minister's speech recorded in Hansard as well as the gazetted draft budgets tabled by the MMKN to the DUN. In particular, the sum of RM3.879 billion when tabled in 2019 was listed as "anggaran" or estimated, but then tabled in 2020 under the head of "disemak" (after review), implying a finality in the figure of RM3.897 billion.

Conclusion – First Impugned Words

[71] In conclusion, and applying the above two-tier test, and reading the defendant's reply statement as a whole the first impugned words is in fact not defamatory of the plaintiff in the circumstances of this case. In addition to the defence of justification, the other defences of fair comment and qualified privilege also come into play and are discussed below.

Second Impugned Words

> More importantly, what deal was struck behind closed doors between the GPS Government and Petronas for Sarawak to give up its petroleum rights in exchange for a meagre payment of RM2 billion which Petronas was already obligated to pay under the Court Order? Sarawak received nothing in exchange for the waiver of our petroleum rights.

[72] Applying the disinterested objective test this second statement points to a cloak and dagger deal done by the plaintiff to secure the deal evidenced in the joint statement the effect of which was to sacrifice the rights and interests of Sarawakians. This statement is also capable of carrying with it

a defamatory meaning as such deal was wrongly done without consultation with the rightful stakeholders being the Sarawakians represented through their elected representatives in the DUN.

[73] The following task is to ascertain if this second statement is in fact defamatory in the circumstances of this case (see the test in the *dicta* narrated in para. [39] above; *Synergy Promenade Sdn Bhd v. Datuk Seri Hj Razali Hj Ibrahim* [2021] 8 CLJ 891).

The Consultative Committee On The Malaysia Agreement 1963 (MA 63)

[74] The Sarawak Dewan Undangan Negeri (DUN) had set up this special Select Committee ("CCMA") made up of elected assemblymen from both the ruling and opposition factions ostensibly to be consulted on and to advise the Government on matters relating the Malaysia Agreement 1963. It is headed by current Speaker of the DUN.

[75] The CCMA's report dated 10 June 2020 was presented as evidence under bundle B1 of the bundle of documents. It is immediately noted that this report was dated after the date of the joint statement. The defendant was a member of this CCMA and was present at this meeting. Also present was the State Attorney General which was also represented by Dato Sri JC Fong who incidentally, led the plaintiff's legal team in the trial of this suit. It recorded the proceedings of the CCMA held on the 10 June 2020. The purpose of this meeting can be seen in the opening address by the Chairman which was to discuss the contents of the joint statement (words in brackets added):

> Today, I passed the relevant documents in the file for you to peruse. On the 8th May, YB Datuk Sharifah Hasidah made a joint media statement with PETRONAS (the joint statement). Further statement from Datuk Sharifah Hasidah appeared in the Borneo Post on the 10th May. That triggered a motion in the DUN by YB See Chee How which was dismissed and I told him it should be dealt with by the Consultative Committee. Subsequently, other members followed suit calling for a meeting of this Committee to discuss on this matter. In the meantime the civil suit between PETRONAS and the Comptroller of tax is still ongoing. So, we are reminded of the rules of *sub-judice*. Further, just a few days back, the State Government is filing a civil suit against YB Dato Wong Soon Koh (the defendant) that will further create also the doctrine of *sub-judice*.

[76] It is clear that members of the CCMA were concerned about the contents of the joint statement and that it caused "confusion" and "concern".

[77] In p. 29 of the report the Chairman stated:

> ... let me draw your attention to Sanding order 78. Every select committee shall make a report to the Dewan upon matters referred to it as soon as possible ...

[78] And then later conceded in p. 34:

> To protect Sarawak's Rights under MA 63 and Sarawak's Rights over oil and gas in our negotiation it is proposed that there must be a two track negotiation. The first track can be led by the Senior Federal Minister and Ministers from Sarawak who walk in the corridor of federal Power. The second track shall comprise 5 members of the Consultative Committee.
>
> In this way the terms and conditions of the negotiation are transparent and the Consultative Committee and the Government will have a clearer picture of the entire scenario before embarking on a course of action that is beneficial to Sarawak and its people.

[79] Most telling was the remarks of the Chairman deep into the meeting at p. 36 of the CCMA report:

> Tuan Pengerusi: Dato Sri JC Fong, most of the YB including myself are **in complete darkness** about what is negotiated, what is agreed upon and what is not agreed upon.
>
> (emphasis added)

[80] Although this meeting of the CCMA was held after the issuance of the impugned words, the sentiments of the Chairman of the CCMA does lend credence to the defendant's allegation that the plaintiff's deal with PETRONAS resulting in the joint statement was concluded "behind closed doors" meaning no more than out of the public knowledge or purview. Dato Sri JC Fong did not intimate in the course of the meeting of the CCMA if the State Attorney General's Chambers drafted the joint statement.

[81] Later during the trial, it transpired that the joint statement was in fact prepared directly by the Chief Minister's Office. (See para. 104). The CCMA appeared not to be privy to the negotiations with PETRONAS leading to the joint statement. This court finds that the term "behind closed doors" is not derogatory or demeaning in any sense of the plaintiff save to suggest that the negotiations were conducted in private, and in any case without the knowledge and participation of the CCMA.

[82] On the issue of the alleged defamatory words in the second part of the second impugned words being, "for Sarawak to give up its petroleum rights in exchange for a meagre payment of RM2 billion", the justification of these words are derived from the joint statement itself, as the negotiated consideration for the payment of the RM2 billion sales tax by PETRONAS:

> ... PETRONAS masih diiktiraf sebagai syarikat minyak negara yang mempunyai kuasa penuh dalam mengawal selia seluruh pembangunan industri minyak dan gas di negara ini, selaras dengan Perlembagaan Persekutuan ...

[83] The significance of this extract must be read in the context of the prior and well-publicised stand taken by the plaintiff's that the PD Act and the PD Agreement signed between the State Government of Sarawak and PETRONAS was invalid and did not bind the State and yet this extract signed by the State asserts the contrary.

Conclusion On The Second Impugned Words

[84] In conclusion, and having applied the two-tier test for defamation, I conclude that though the second impugned words was capable of having a defamatory meaning, it was not in fact defamatory of the plaintiff.

[85] The second impugned words had a substance of truth based on the facts known at the time of its publication. Hence, the defence of justification has been established in that the second impugned words was substantially true.

The Third Impugned Words

> I have posed this question which must have been in the minds of all Sarawakians; Is this GPS government now silent because its MPs are in the Cabinet of the Federal Government.

[86] As stated above, the plaintiff had previously taken a firm stand that the PD Agreement signed between the State Government of Sarawak and PETRONAS was invalid and did not bind the State and yet this extract signed by the State asserts the contrary. When the Pakatan Harapan Government collapsed and was replaced by the Perikatan Nasional Government, this was achieved with the co-operation or coalition of the GPS Government. In exchange, members of the plaintiff's GPS were appointed as Federal and Assistant Ministers. There were eight members of the GPS in the Federal Cabinet with another two appointed as special envoys with ministerial status.

[87] The defendant is therefore alleging the coalition arrangement with the Federal Government had muzzled or reversed the plaintiff's once vociferous stand against the PD Agreement.

[88] Surprisingly, throughout the trial I am not able to recall or find documentary or other evidence led by the plaintiff to prove that this third impugned words was false, and hence a lie and thus defamatory of the plaintiff.

Conclusion – Third Impugned Words

[89] I find this third impugned words (para. 3(c) of the statement of claim) to be not in fact defamatory of the plaintiff in the circumstances of this case. In the first place, the plaintiff has not discharged its burden to prove this third impugned words as defamatory. For instance, there was no cogent evidence led to show that the stand of the plaintiff against the validity of the PD Act or the PD Agreement was equally vociferously canvassed after as well as before their members were appointed Ministers in the Federal Cabinet.

The Impugned Words As A Whole

[90] Assessing the three sets of the impugned words against the two-tier test referred to earlier and as a whole I come to the same conclusion that they are not defamatory of the plaintiff, be it the Legislature, the MMKN or both in the circumstances of this case.

Qualified Privilege And Fair Comment

[91] The parties have submitted at length on the additional defences of qualified privilege and fair comment. However, I am satisfied that the above reasoning already adequately dispose of the issues in this case and I leave parties to canvass these issues on the appeal. I shall therefore make just a cursory analysis of these defences against the established facts of this case.

Qualified Privilege

[92] In the famous case of *Adam v. Ward* [1917] AC 309, Lord Atkinson cited the following conditions that can support the defence of qualified privilege:

> ... a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[93] In the case *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2; [1964] 1 MLJ 142b, Hepworth J emphasised that the element of reciprocity is essential to support the defence of qualified privilege and the burden falls on the defendant to prove. He ruled:

> A common interest for the purpose of the defence of qualified privilege to an action for libel occurs where the words complained of as defamatory were published in pursuance of an interest or of a duty, legal, social, or moral, to publish them to the person to whom they were published and the person to whom they were published had a corresponding interest or duty to receive them. **The reciprocity is essential**. The *bona fide* belief of the defendant that there existed such an interest or that he was under such a duty to make the communication is immaterial, for the thing which is relevant to the question whether or not the occasion was privileged is the existence in fact of the duty or interest and not merely the defendant's belief in the existence of the one or the other.
>
> (emphasis added)

[94] In this case the defendant and the persons making up the plaintiff are elected assemblymen. They have taken an oath of office after being elected by the people. They had sworn to uphold the Constitution and to serve the electorate. It is therefore not hard to see that there is a duty on the part of the defendant to raise the issues as he did in both his first press statement and the defendant's reply statement, and likewise the plaintiff had a reciprocal

duty to receive such questions and to deal with or to respond to them as they too have taken an oath ultimately to serve the interest of the electorate and the Constitution.

[95] In the absence of malice (which this court has not detected in the impugned words) the impugned words are protected by the defence of qualified privilege. The defendant's reply statement had expressly described the defendant in his official elected designation of, "Yang Berhormat Dato Sri Wong Soon Koh, President of Parti Sarawak Bersatu".

Fair Comment

[96] In order for the defence of fair comment to succeed, the defendant must prove the following:

(i) that the words complained of are comments, though they may consist of or include inference of facts;

(ii) that the comments are on a matter of public interest; and

(iii) that the comments are based on facts, truly stated. They must also be fair and which a fair-minded person can honestly make on the facts proved.

(see *Tun Datuk Patinggi Hj Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393).

[97] In the case of *Joshua Benjamin Jeyaretnam v. Goh Chok Thong* [1989] 1 LNS 34; [1989] 3 MLJ 1, the Privy Council said as follows:

> It is of course well established that a writer may not suggest or invent facts and then comment upon them, on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. The commentator must get his basic facts right.

(extracted with gratitude from the judgment of Datuk Ravinthran Paramaguru J (as he then was) in *Wong Kii Yii v. Datuk Chin Chee Kee* [2013] 1 LNS 510).

[98] The above discussion had already seen that the impugned words were based on facts, such as the budget tabled before the DUN in respect of the anticipated State revenue from petroleum products. Further that the negotiations leading to the joint statement were prepared and finalised and signed without the participation or knowledge of both the Attorney General's Office nor of the Consultative Committee of the Malaysia Agreement (CCMA) (see para. [79] above where the Chairman of the CCMA complained of being in the dark about the negotiations).

[99] Again, as this court has not detected any clear evidence of malice save for political rivalry this defence of qualified privilege has been established by the defendant.

Additional Considerations On The Test Of Whether The Impugned Words Are In Fact Defamatory

[100] This case merits the discussion of two more areas of some importance in the enquiry as to whether the impugned words, though capable of carrying a defamatory meaning, are actually defamatory of the plaintiff.

Freedom Of Speech

[101] Article 10(1)(a) of the Federal Constitution provides that:

> every citizen has the right to freedom of speech and expression.

This article further provides that Parliament may by law impose restrictions as to provide against, *inter alia*, contempt of court and defamation.

> Yet, interestingly enough, the restrictions (and the variations of them) are found, in the main, driven by common law through the decisions of our courts rather than by Parliament. The combination of Article 10(1)(a) and 10(2)(a) and the Defamation Act 1957 and our court's declarations of the law of defamation sometimes seems suited." (see "*Of Public Interest, Freedom of Speech and the Law of Defamation*" Darryl SC Goon (now Datuk, JCA) JMJ, Jan 2018, pg 207)

[102] There is no doubt that the law as it now stands allows remedy and protection for damage of one's reputation. This has to be balanced against the constitutional right to freedom of expression in art. 10 of the Federal Constitution. Where the line is drawn to balance the two can only one day be decided and legislated by Parliament. However, the test of whether a statement is in fact defamatory has been decided by the courts, though objective in nature, to include the facts of the case. So what is good for the goose is not necessarily so for the gander. For example the impugned words if uttered by deranged man in a mental hospital as compared to the elected defendant and opposition leader has each to be weighed differently and hence the proverbial dividing line between defamation and the freedom of expression represents a challenge to any legal draughtsman seeking to draft limits of free speech into legislation.

[103] In this case the impugned words, devoid of any malicious demeaning, derogatory or foul language, read in the context of the whole defendant's reply statement are utterances expected of the defendant taking into account the content of the joint statement, the backdrop of the PD Act and the PD Agreement (discussed above) and the capacity and sworn duty of the defendant as an elected State assemblyman. While it has been found that the impugned words of the defendant had no malice, conversely, one equally has to ask if this suit by the plaintiff was motivated by the intention of muzzling the opposition leader with the State Elections around the corner.

The Plaintiff's Joint Statement Has Invited Impugned Words

[104] During the trial it emerged that the joint statement was negotiated through the office of the Chief Minister. From the notes of proceedings (words in brackets added):

> Any when PW1 was cross-examined:
>
> Q34: Who gave you the authority to issue the joint statement on behalf of the State Government of Sarawak together with the Chairman of Petronas?
>
> A: It was given to me by the Chief Minister Office.
>
> Q35: Who in the Chief Minister office?
>
> A: The Chief Minister.

[105] And further on:

> Q80: Who had given you the figure of RM2 billion at the time of publishing the joint statement with Petronas on 8.5.2020?
>
> A: The joint statement was presented to me by the Chief Minister Office as a result of the discussion by the Minister of Work, YB Datuk Sri Fadillah Yusof and Petronas.

[106] Also:

> Mr Adzrul (Counsel for the plaintiff): The witness (PW1) had already testified that the (joint) statement was prepared by the Chief Minister Office ...

[107] Based on this, the CCMA was understandably, in the words of its Chairman, "in complete darkness" and so it seems, was the State Attorney General's Chambers.

[108] The joint statement was drafted in a manner which, *prima facie*, favoured PETRONAS as it appeared to be worded in the manner of an agreement with the payment of the RM2 billion as the consideration:

> Namun begitu, kesemua surat cara perjanjian yang telah dipersetujui antara Kerajaan negeri Sarawak dengan PETRONAS di bawah Akta Kemajuan Petroleum 1974 (PDA) masih sah dan berkuatkuasa. Begitu juga, PETRONAS masih diiktiraf sebagai syarikat minyak negara yang mempunyai kuasa penuh dalam mengawal selia seluruh pembangunan industri minyak dan gas di Negara ini, selaras dengan Perlembagaan Persekutuan.

The same joint statement had further been worded to suggest that the RM2 billion was full and final settlement when the tabled State Budget quoted a figure closer to RM3.897 billion:

> ... akan membuat **bayaran penuh** ke atas cukai jualan yang dikenakan oleh Kerajaan Negeri Sarawak ke atas produk petroleum bagi tahun 2019 **berjumlah RM2 billion** ... (emphasis added)

And further, it suggested that there was an agreement the tax would be adjusted downwards in the future:

> Sarawak dan Petronas seterusnya **bersetuju** bahawa cukai jualan ke atas produk petroleum yang diperuntukkan di bawah SST dikenakan pada kadar yang lebih rendah secara bertempoh berdasarkan rundingan yang akan diadakan kelak. (emphasis added)

[109] The joint statement was intended to serve the sole purpose of evidencing the amicable discontinuance of the legal suits between the plaintiff and PETRONAS and related appeals to the Court of Appeal. But the joint statement went much further. It represented to me a thinly veiled attempt to cement certain declaratory conclusions on issues relating to PETRONAS' right to oil resources in the State with the RM2 billion payment as consideration. I cannot believe the joint statement ever passed the scrutiny of the State Attorney General's Chambers.

[110] The above discussion is relevant to the issues at hand because, in the light of the State's sensitivities in relation to the PD Act and the PD Agreement, the above content in the joint statement is fuel for further anti-PD Act and the PD Agreement sentiment and it would be naive of the plaintiff to expect the citizens of the State especially the elected representatives to be silent. Hence the nature and content of the joint statement have itself invited questions such as the impugned words. It is therefore hard to find the defendant liable for defamation when the actions of the plaintiff have directly invited the response complained of, given the known sensitivities surrounding the PD Act and the PD Agreement.

[111] Additional relevance arises from the second tier of the test for defamation in that one must test if the *prima facie* defamatory statements are in fact defamatory of the plaintiff, in the circumstances of the case.

Public Interest Considerations

[112] In the case of *Goldsmith & Anor v. Bhoyrul & Ors* [1997] 4 All ER 268, Buckley J held that it is not in the public interest to permit a political party seeking power at an election to sue for defamation:

> ... it seems to me that the public interest in free speech and criticism in respect of those bodies putting themselves forward for office or to govern is also sufficiently strong to justify withholding the right to sue. Defamation actions or the threat of them would constitute a fetter on free speech at a time and on a topic when it is clearly in the public interest that there should be none.

Freedom of speech takes precedence when public interest is at play. This is not to say that the plaintiff does not have an actionable cause. Just like for any fundamental right, there are limits. Any suit which impinges on clear

public interest may be successfully met by the argument that the balance between the constitutional right of freedom of expression and the right to sue for reputational damage has tipped in favour of the former as a necessary civil protection of public interest.

Conclusion

[113] From the outset of this case I had urged parties on many occasions to resolve this political dispute within the political arena and not through the courts. Was it not once said by a leading Malaysian politician that:

> ... in politics you have no permanent friends or enemies, only permanent interests ...

This case which ended after a ten-day trial with seven witnesses from the plaintiff and another three from the defendant has sapped the money and time from both sides as well as this court which would have been better spent serving the electorate to enhance the sense of legitimacy of the Government in the eyes of the Sarawakians.

[114] It is this court's decision that:

(i) The plaintiff was wrongly named as plaintiff and should have been limited to or included the MMKN and hence the *locus standi* of the plaintiff is not clearly established for this defamation suit.

In the alternative and additionally:

(ii) The impugned words do not defame the plaintiff.

(iii) The plaintiff's writ and statement of claim in encls. 1 and 2 are dismissed with costs of RM30,000 to the defendant subject to allocatur.